Diana Nelson Tanoja v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–20 OF 2005
TENGKU BAHARUDIN SHAH, SULONG MATJERAIE AND AHMAD MAAROP JJCA
9 JULY 2009

Criminal Procedure — Statements — Cautioned statements — Admissibility of — Whether Filipino accused was offered a 'Tagalog' interpreter — Accused could understand and speak English fluently — Statement held to be admissible after a voire dire — Whether appellate court should be slow in interfering with finding made in voire dire unless finding flawed with a distinct material error of principle

Criminal Procedure — Trial — Miscarriage of justice — Grounds of judgment written before hearing of submissions — Whether trial judge prejudged issue — Whether submission at end of defence case discretionary — Whether trial judge could decide without hearing defence's submission

Criminal Procedure — Trial — Submissions — Whether submission at end of defence case discretionary — Whether trial judge could decide without hearing defence's submission

The appellant, a Filipino, arrived at the Kuala Lumpur International Airport ('KLIA') on a flight from Amsterdam and was detained by one ASP Maidu ('PW3') upon collecting his luggage. Upon cutting open stitches sewn untidily at the bottom of a black brief case, exh P7, carried by the appellant, PW3 found two compartments containing what was later confirmed to be drugs. A cautioned statement which was recorded from the appellant on the same day was admitted as part of the prosecution's evidence after a voire dire to determine its admissibility. The appellant testified that the drug was meant for one 'Alhadjie' in Bangkok from whom he will be receiving US$3,000–US$4,000, upon delivery. After trial, the appellant was convicted and sentenced to death for trafficking in 508.6g of cocaine. Trial judge found that actual possession of the drug had been established beyond a reasonable doubt. The appellant appealed against the conviction and sentence on the following grounds: (i) that the cautioned statement was inadmissible as there was nothing in the record to say that the appellant was offered or given a 'Tagalog' interpreter before the cautioned statement was recorded. It was also alleged that when the appellant was inside the KLIA office for three hours no

drink or food was given to him; (ii) that possession was not established since the appellant claimed that he did not know what the white powder which was given to him at the Amsterdam airport was; and (iii) that the learned trial judge had prejudged the issue before hearing the submission because the grounds of judgment was written on 18 January 2005 as reflected in the appeal record whilst the judgment was only handed down on 26 January 2005.

Held, dismissing the appeal:

(1) The appellant could understand and speak English fluently. It could be seen from the cautioned statement that the appellant chose to speak in English when asked as to what language he would like to speak (see para 18).

(2) The purpose of having a trial within a trial is to determine if the alleged statement was made voluntarily with no possible inducement, threat or promise. If a trial judge has, after hearing all the testimony, come to a conclusion that the statement was made voluntarily, an appellate court should be slow in interfering with such finding unless it can be shown that such finding was flawed with a distinct material error of principle. Thus, the ruling on admissibility of the cautioned statement by the trial judge was correct (see para 26).

(3) There was no truth on the allegation by the appellant that he was not given food or drink during the three-hour period he was at the KLIA (see para 27).

(4) P7 was in the custody and control of the appellant from the Amsterdam airport right up to the time of his arrest at the baggage collection area at KLIA. The 508.6g of cocaine were found concealed in two compartments in P7 upon examination of the same by PW3. With the cautioned statement being held admissible, the argument that the appellant had no knowledge of the incriminating items sewn inside P7 could not stand. Further, the appellant said he knew that there was drug inside P7. Consequently there was neither the need to secure the finger nail clipping of the appellant nor was it sine qua non to dust the items for fingerprints around the sewn area of P7 (see para 32).

(5) The date 18 January 2005 must be a typing error. Even if, the judgment was dated 18 January 2005, s 181(1) of the Criminal Procedure Code does not require submission. The word 'may' indicates a discretion. Therefore, submission at the end of the defence case is discretionary and not mandatory. The trial judge could if he wanted to, decide without having the need to hear submission from learned defence counsel. Submission was not evidence and hence the judgment was not

defective. Anyhow, the grounds of judgment showed that the learned judge did consider the submission (see para 38).

[Bahasa Malaysia summary

Perayu, seorang warganegara Filipina, tiba di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') dalam satu penerbangan dari Amsterdam dan ditahan oleh ASP Maidu ('PW3') semasa mengambil bagasinya. Selepas memotong jahitan yang tidak kemas di bahagian bawah beg bimbit hitam, eksh P7, yang dibawa oleh perayu, PW3 menemui dua bahagian yang mengandungi apa yang akhirnya disahkan sebagai dadah. Pernyataan beramaran yang direkodkan daripada perayu pada hari yang sama diterima sebagai sebahagian keterangan pihak pendakwaan selepas voire dire untuk menentukan kebolehterimaan. Perayu memberi keterangan bahawa dadah tersebut kepunyaan 'Alhadjie' yang berada di Bangkok di mana dia akan menerima US$3,000–US$4,000 selepas penghantaran. Selepas perbicaraan, perayu disabitkan dan dijatuhi hukuman mati kerana mengedar 508.6g kokain. Hakim perbicaraan mendapati milikan sebenar dadah tersebut dibuktikan melampaui keraguan munasabah. Perayu merayu terhadap sabitan dan hukuman atas alasan berikut: (i) bahawa pernyataan beramaran tersebut tidak boleh diterima memandangkan tidak tercatat di dalam rekod yang menyatakan bahawa perayu ditawarkan atau diberikan jurubahasa 'Tagalog' sebelum pernyataan beramaran direkodkan. Dihujahkan bahawa semasa perayu berada dalam pejabat KLIA selama tiga jam dia tidak diberikan minuman atau makanan; (ii) bahawa milikan tersebut tidak dibuktikan memandangkan perayu mendakwa dia tidak mengetahui apakah serbuk putih yang diberikan kepadanya di lapangan terbang Amsterdam; dan (iii) bahawa hakim perbicaraan yang bijaksana telah membuat penghakiman awal isu tersebut sebelum perbicaraan penghujahan kerana alasan-alasan penghakiman ditulis pada 18 Januari 2005 sepertimana yang tertera di rekod rayuan manakala penghakiman hanya diberikan pada 26 Januari 2005.

Diputuskan, menolak rayuan:

(1) Perayu boleh memahami dan bercakap dalam bahasa Inggeris dengan fasih. Ini boleh dilihat daripada pernyataan beramaran bahawa perayu memilih untuk bercakap dalam bahasa Inggeris apabila ditanya mengenai bahasa apa yang dipilih perayu untuk bertutur (lihat perenggan 18).

(2) Tujuan mengadakan perbicaraan dalam perbicaraan adalah untuk menentukan sekiranya pernyataan yang dihujahkan dibuat secara sukarela dengan tiada kemungkinan dorongan, ancaman atau janji. Sekiranya hakim perbicaraan selepas mendengar semua keterangan,

membuat kesimpulan bahawa pernyataan tersebut dibuat secara sukarela, mahkamah rayuan tidak akan mencampuri dapatan tersebut melainkan dapatan tersebut didapati cacat dengan kesilapan prinsip yang jelas dan material. Oleh itu, perintah atas kebolehterimaan pernyataan beramaran oleh hakim perbicaraan adalah betul (lihat perenggan 26).

(3) Tidak terdapat kebenaran dalam dakwaan oleh perayu bahawa dia tidak diberikan makanan atau minuman sepanjang tiga jam dia berada di KLIA (lihat perenggan 27).

(4) P7 berada dalam jagaan dan kawalan perayu dari lapangan terbang Amsterdam sehingga masa dia ditangkap di bahagian pengambilan bagasi di KLIA. 508.6g kokain ditemui tersembunyi dalam dua bahagian P7 semasa pemeriksaan oleh PW3. Dengan penerimaan pernyataan beramaran, hujahan bahawa perayu tidak mempunyai pengetahuan mengenai barangan yang mencurigai yang dijahit dalam P7 tidak berasas. Selanjutnya, perayu menyatakan bahawa dia tahu bahawa terdapat dadah di dalam P7. Oleh itu tiada keperluan untuk mendapatkan ketipan kuku jari perayu atau adalah sine qua non untuk memupur barangan tersebut untuk mendapatkan cap jari di sekitar bahagian yang dijahit pada P7 (lihat perenggan 32).

(5) Tarikh 18 Januari 2005 adalah satu kesilapan menaip. Walaupun penghakiman tersebut bertarikh 18 Januari 2005, s 181(1) Kanun Prosedur Jenayah tidak memerlukan hujahan. Perkataan 'may' menunjukkan budi bicara. Oleh itu, hujahan pada akhir kes pembelaan adalah mengikut budi bicara dan bukannya mandatori. Hakim perbicaraan boleh sekiranya beliau mahu, memutuskan tanpa perlu mendengar hujahan daripada peguam bela yang bijaksana. Hujahan bukannya keterangan dan oleh itu penghakiman tersebut tidak cacat. Walau bagaimanapun, alasan-alasan penghakiman menunjukkan bahawa hakim yang bijaksana telah mempertimbangkan hujahan tersebut (lihat perenggan 38).]

Notes

For cases on cautioned statements, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4365–4372

For cases on miscarriage of justice, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4857–4859

For cases on trial, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4549–5094

Legislation referred to

Criminal Procedure Code s 181(1)
Dangerous Drugs Act 1952 ss 37, 37(d), (da)(ix), 37A(1)

Sreekant Pillai (Paul Fernandez with him) (Lim Sreekant & Co) for the appellant.
Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Sulong Matjeraie JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] The appellant, Mr Diana Nelson Tanoja, a Filipino, was convicted and sentenced to death by the High Court at Shah Alam, Selangor Darul Ehsan after a full trial where he was found guilty of trafficking in 508.6g of cocaine at 7.45am on 22 August 2002. The appellant is now appealing against the conviction and the mandatory sentence imposed.

FACTS OF THE CASE

[3] The appellant was on the flight from Amsterdam reaching Kuala Lumpur International Airport ('KLIA') at the early hours of the morning of 22 August 2002. He collected his luggage at KLIA Carousel 'D' at the baggage collection area. He was observed to be carrying a black brief case (exh P7) in his right hand a paper bag in his left hand together with a back pack (P14) on his shoulder. The appellant was detained for a random check by ASP Maidu bin Abu Bakar (PW3) who escorted him to the narcotics office at Level 3 KLIA. In the presence of the appellant, his brief case, back pack and the paper bag were examined at the said narcotics office. When the back pack and the paper bag were being examined, the appellant appeared normal and composed. Nothing incriminating was however found therein. In his possession, the appellant also had his passport (P26), his air ticket (P27) and a Customs & Excise Department's declaration form (P28).

[4] The appellant's black brief case (exh P7) was examined and in it clothing such as T Shirt, stockings and underwear were found (exhs P8, P9, P10, P11, P12 and P13). The appellant was queried as to why those items were not placed in the back pack. No logical answer was given by the appellant who began to turn pale making the examining officer suspicious. This resulted in PW3 making a more thorough examination of the brief case.

[5] PW3 found stitches sewn untidily at the bottom of the brief case. He cuts open the said stitches and found two compartments on both sides of the brief case into which had been packed whitish powdery and lumpy substance (see photographs marked P15A and P15C) suspected to be drugs.

[6] The exhibits were seized and a search list prepared and served on the appellant (P17). The exhibits were subsequently handed over to the investigating officer of this case, Inspector Wan Mazlan (PW5).

[7] A cautioned statement (P38) was recorded from the appellant on the same day at 3.45pm by Chief Inspector Lee Chee Yong (PW6). P38 was admitted as part of the prosecution's evidence after a voire dire was held to determine its admissibility. The learned High Court judge, in his ground of judgment, said that he was entirely satisfied that P38 was made voluntarily by the appellant and that there was no inducement, threat or promise for making the statement.

[8] The whitish powdery and lumpy substance was sent by PW5 to the chemist, Nazarudin (PW4) on 26 August 2002 for analysis. PW4 confirmed, upon analysis that the said whitish powdery and lumpy substance was found to be cocaine with a net weight of 508.6g.

FINDING OF THE HIGH COURT JUDGE

[9] At the close of the prosecution case, the learned trial judge was satisfied that the prosecution had proved a prima facie case on the charge and called upon the appellant to enter his defence.

[10] The appellant gave his evidence under oath in the witness box. Based on his testimony of the appellant in cross-examination and his admission in his statement made in exh P38, it was the finding of fact made by the learned trial judge that the appellant had at all material times full knowledge of the drugs in P7 and the nature of the drugs, in that they were prohibited drugs, even though he might not have knowledge as to the type of drugs in his possession, that is, whether it was cocaine or otherwise.

[11] Therefore it was the finding of the learned trial judge that actual possession of the drug has been established beyond a reasonable doubt by the prosecution without having to invoke the presumption under s 37(d) of the Dangerous Drugs Act 1952.

[12] The quantity of cocaine in the possession of the appellant is large; 508.6g. It is more than 12 times the minimum rebuttable presumption of trafficking of 40g or more as cocaine as prescribed under s 37(da)(ix) of the Dangerous Drugs Act 1952.

[13] The appellant has not produced any evidence to rebut the presumption on the balance of probabilities. Neither did the appellant testify

that he was a drug addict nor did he say that the cocaine was for his own consumption. On the contrary, the appellant testified that the drug was meant for one 'Alhadjie' in Bangkok from whom he will be receiving US$3,000 to US$4,000 upon delivery of the same.

[14] He failed to rebut the presumption under s 37(da)(ix) of the Dangerous Drugs Act 1952.

[15] The significant point to note here is that the appellant brought the drug from Amsterdam to Kuala Lumpur in P7 on a MAS flight with custody, control and actual knowledge of the drug.

PETITION OF APPEAL

[16] The appellant has filed his petition of appeal on 15 March 2006. There were 11 grounds included in the petition of appeal but at the hearing on 17 June 2008 learned counsel for the appellant filed into this court an undated but duly signed skeletal submission. It is only three broad points were raised, vis:

(a) admissibility of statement made under s 37A(1) of the Dangerous Drugs Act 1952;

(b) possession; and

(c) that the learned trial judge had prejudged the issue before hearing the submission.

[17] In his argument before us, learned counsel condensed his argument in the three broad points outlined above. We shall deal with these broad points separately.

Admissibility of cautioned statement under the provision of s 37A of the Dangerous Drugs Act 1952

[18] It is the contention of learned counsel of the appellant that there was nothing in the record to say that his client was offered or given a 'Tagalog' (the mother-tongue of the appellant) interpreter before the cautioned statement was recorded. In fact it was argued that the appellant's request for a 'Tagalog' interpreter was never entertained. Learned counsel suggested for he could not even understand the words 'not obliged' and 'whether'. Hence it was argued that the issue of the utmost importance is the 'understanding of the caution'.

[19] Secondly it was alleged that when the appellant was inside KLIA office for three hours no drink or food was given to him.

[20] Firstly we will deal with the question pertaining to language used. This argument is a non-starter. Chief Inspector Lee Chee Yong, the first witness in the trial within a trial ('TWT', PW1) told the court at p 75 of the appeal record as follows:

> Saya berkomunikasi dengan suspek dalam Bahasa Inggeris. Dia faham apa yang saya maksudkan. Beliau faham apa yang saya cakapkan. Saya ada tanya pada saspek samada beliau mahu seorang jurubahasa Filipina. Beliau kata tidak perlu kerana beliau fasih cakap Bahasa Inggeris.

(Our translation):

> I communicated with the suspect in the English language. He understood what I meant. He understood what I said. I did ask the suspect whether he wanted a Filipino interpreter. He said no need as he speaks fluent English.

[21] From the above it is very clear that the appellant has confirmed that he can understand and speak English language fluently.

[22] The fact that the appellant could communicate in English was further confirmed by ASP Maidu bin Abu Bakar of the Unit Operasi Urusetia KPN Tatatertib who also gave evidence in the TWT as prosecution witness No 2 — (PW2). At p 91 of the appeal record it reads:

> Saya tidak tanya saspek samada beliau perlu Jurubahasa Tagalog oleh kerana saspek dan saya bercakap dalam Bahasa Inggeris dan dia fasih Bahasa Inggeris.

(Our translation):

> I did not ask the suspect if he needed a Tagalog interpreter as we spoke in English and he is fluent in the English language.

[23] It can also be seen in the cautioned statement (P38) found at p 676 of the appeal record that at p 677 the appellant chose to speak in English when asked as to what language he would like to speak. An excerpt of the accepted cautioned statement at p 2 shows as follows:

> Q — In what language would you like to speak?
>
> A — English.

[24] Further in the cross-examination during the trial within a trial, the appellant told the trial court that when he was in Amsterdam he spoke in 'broken English'. This suggests that the appellant can understand and speaks English.

[25] The learned trial judge in accepting the cautioned statement said at p 638 of his grounds of judgment:

> The cautioned statement (P38) was received as part of the prosecution's evidence, after a trial within a trial to determine whether it had been made voluntarily by the accused. On the evidence before me, I was entirely satisfied the said statement was voluntarily made by the accused. I was entirely satisfied that the accused was indeed able to communicate with SP6 in English, and the absence of a Filipino interpreter did not render the statement of the accused inadmissible in law.

[26] This is a finding of fact by the learned trial judge. The purpose of having a trial within a trial is to determine if the alleged statement was made voluntarily with no possible inducement, threat or promise. If a trial judge has, after hearing all the testimony, come to a conclusion that the statement was made voluntarily, an appellate court should be slow in interfering with such finding unless it can be shown that such finding was flawed with a distinct material error of principle. Having regard to the general principles applicable to voire dire hearing and in the absence of a distinct and material error of principle we are reluctant to interfere with the finding of fact by the learned trial judge. It is therefore our considered view that the ruling on the admissibility of the cautioned statement (P38) by the learned trial judge was a correct one.

[27] There is not even an iota of truth on the allegation by the appellant that he was not given food or drink during the three hour period he was at the KLIA. Inspector Wan Mazlan bin Wan Abdul Rahman (TWT PW3) has testified at p 93 of the appeal record that the appellant was given food and drink which the appellant duly consumed. This evidence through challenged, albeit casually, remained intact.

Possession

[28] It is common ground that the appellant had three pieces of luggage including P7. Learned counsel for the appellant was quick to remind this court that for possession to be proved, knowledge must be proved as well. The appellant testified that when the police were checking his luggage they discovered white powder in P7 which was given to him at Amsterdam airport. He claimed that he did not know what the white powder was.

[29] The appellant testified that he frequently travelled overseas. In one of his travels he met Ali Haji ('Alahadjie') for the first time in Bangkok on 7 August 2002. Alahadjie bought him an air ticket to tour Ecuador and asked him to go to Amsterdam to meet two black guys and two Caucasians. Alahadjie told the appellant that a bag would be given to him at the Amsterdam airport but did not say what the contents were. In return Alahadjie would give him between US$3000 and US$4000 if he met the two black guys and two Caucasians.

[30] On 7 August 2002 the appellant left Bangkok for Amsterdam from where he took a flight to Ecuador and returned to Amsterdam on 20 August 2002.

[31] On 21 August 2002 at about 8am, the appellant was at the Amsterdam airport, on transit from Ecuador to Bangkok. His flight to Kuala Lumpur was scheduled at 12 noon. At about 10.30am he met two black guys and two Caucasians at the airport and after few formalities he was given P7. Upon being asked as to the contents of the bag, they told the appellant to just take P7 and pass it to Ali Haji ('Alahadjie') in Bangkok. They stayed together at the airport until the appellant boarded the plane at 11.45am.

[32] There is no dispute that P7 was in custody and control of the appellant from Amsterdam airport right up to the time of his arrest at the baggage collection area at Carousel D, KLIA on 22 August 2002 at about 7.45am.

[33] Further there is also no dispute that 508.6g of cocaine were found concealed in two compartments, one on each side of P7 upon examination of the same by PW3.

[34] With the cautioned statement (P38) being held admissible by the learned trial judge, the argument of learned counsel that the appellant had no knowledge of the incriminating items sewn inside P7 cannot therefore stand.

Learned counsel alleged that learned trial judge had prejudged the issue before hearing the submission

[35] Learned counsel for the appellant contended that the learned trial judge had prejudged the issue even before hearing submission. He alleged that grounds of judgment was written was 18 January 2005 as reflected at the foot of p 648 of the appeal record Vol 2. But the judgment was only handed down on 26 January 2005. Counsel argued that the learned judge had made up his mind well before hearing the submission of counsel. The appellant was

consequently prejudiced. Therefore learned counsel for the appellant asked this court to declare that the trial before the High Court judge as a mistrial and urged this court to remit this case back to the High Court for a retrial.

[36] The date of 18 January 2005 must be a typing error. Even if, for a moment that, we say that the judgment was dated 18 January 2005, s 181(1) of the Criminal Procedure Code does not require submission.

[37] For case of reference s 181(1) of the Criminal Procedure Code says:

> When the accused is called upon to enter his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case: ...

[38] The word 'may' indicates a discretion. Therefore it could be seen that submission at the end of the defence case is discretionary and not mandatory. The learned trial judge could if he wanted to, decide without having the need to hear submission from learned defence counsel. Submission is not evidence and hence the judgment is not defective.

[39] After perusing the grounds of judgment, it could be observed that the learned judge did consider the submission of learned counsel when he said at p 643 of the appeal record as follows:

> The defence claims there is no evidence of trafficking and the prosecution have not proved trafficking but merely possession, at the very most, as they have not proved the accused had knowledge of the drugs in P7.

[40] This, in our view, shows that learned trial judge have taken into consideration the submission of the learned counsel for the defence and lends credence to the date of 18 January 2005 being a typographical error.

[41] For the reasons given earlier, this appeal failed and was dismissed. The conviction and sentence imposed by the learned High Court judge were affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum